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DUE PROCESS OF ECONOMY: A PROPOSAL FOR A UNITED STATES ECONOMY COURT

LUIS KUTNER*

THE PROBLEM

The power struggle between labor and management, involving all classes of people, is going on with renewed effort and ever enlarging significance. A defeat of either side causes a curious social consciousness, a kind of humiliation, which does not subside when a labor-management contract is concluded. It is merely a respite for the renewing of efforts for studied intolerance of the public welfare amid conflict or confusion. Under the cloak of compromise, each side substitutes coercive absolutism with little comprehension of the due process standards of economy. Positive solutions are sought by negative means.

The future of industrial and social progress owes much to the growth of cumulative knowledge and to the increasing ability of men in arriving at flexible standards that will enable a rule of law distribution and participation in the material wealth that is produced. There is nothing vague about the way in which all this happens or about the moving forces that push the American industrial economy from one stage to a higher one. Belief in the progress of democratic processes in a continuing complex society presupposes that there can be no boycott on new ideas. A dispute over the jobs of sixty-two men should not be allowed to disrupt the personal and business lives of hundreds of thousands of people, causing incalculable losses and inconvenience. The New York harbor strike halted traffic on two essential railroads. Angry reactions that "there ought to be a law," that, "This is a serious strike that should be settled in the public interest,"¹ did not prevent paralyzing and massive disruptions of commerce.

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1. N.Y. Times, Jan. 24, 1961, p. 12, Sec. of Labor Arthur J. Goldberg's comments on the seeking of labor peace in the New York harbor strike.

Any power which may significantly affect the health and safety of a nation's economy must not be immune from legal accountability. The fact has been demonstrated repeatedly that labor leaders and industrialists possess just such power. A striking illustration of this is the invocation of the national emergency provisions of the Taft-Hartley Act^{1a} on sixteen occasions within twelve years.² These strikes which precipitated the application of the emergency provisions result, of course, from the failure of both labor and management to devise a settlement. However, the union is saddled with the onus of economic disruption simply because the union takes the first formal and manifest action in the economic battle.

As Secretary of Labor Arthur Goldberg has stated:

The injunction provision [of the Taft-Hartley Act] is based on the false assumption that management has nothing to do with causing big strikes In the steel dispute [of 1959], management expected the injunction to be used and that great expectation served to frustrate the collective bargaining process from the beginning. It is certainly clear today that the steel industry's reliance on a prospective injunction, which would force employees to return to work under expired conditions of employment made settlement at the collective bargaining table far more difficult than it would otherwise have been.³

Another writer has said that, "to allocate the *sole* responsibility for the strikes to Unions is like assigning the responsibility for a war to the first party to issue a formal declaration or to fire a shot, regardless of preceding events."⁴

The power envisaged here is not solely the power to disrupt the economy by work-stoppages in strategic industries. This is especially true in an interrelated economy like our own where every disturbance has the effect of a stone dropped into a still pool of water. In 1959, approximately 3700

1a. Labor Management Relations Act (Taft-Hartley Act) § 206, 61 Stat. 136 (1947), 29 U.S.C. §§ 176-80 (1958).

2. See Cox, *Strikes & the Public Interest: A Proposal for New Legislation*, 205 ATLANTIC MONTHLY 48 (1960).

3. Goldberg, *The Role of the Labor Union in an Age of Bigness*, 55 Nw. U.L. REV. 54, 57-58 (1960). The Secretary of Labor has also said that, "What is wrong is not that Congress has acted to assert the public interest, but that the method selected by Congress has been wrong. Simply stated, the Taft-Hartley injunction method is one-sided and it does not help to settle the underlying dispute. It is therefore, not a good method. I am grateful that at least one dividend of the long steel controversy has been the widespread recognition that the Taft-Hartley injunction method is unsatisfactory. The President, Secretary Mitchell, Chairman George Taylor of the Board of Inquiry in the steel dispute, other public officials, labor relations experts and large sections of the press have demonstrated their lack of faith in the national emergency injunction provisions." *Id.* at 57. Another writer has criticized the provisions on the ground that they "do not operate until after a national emergency dispute has occurred." Taylor, *The Adequacy of Taft-Hartley in Public Emergency Disputes*, 333 ANNALS 76 (1961). For an additional criticism see Rehmus, *The Operation of the National Emergency Provisions of the Labor-Management Relations Act of 1947*, 62 YALE L.J. 1047 (1953). See generally Warren, *National Emergency Provisions*, 4 LAB. L.J. 130 (1953).

4. Taylor, *supra* note 3, at 91.

disputes resulted in work-stoppages. These industrial conflicts involved a total of 69,000,000 lost man days.⁵ In 1958, the figures were 3694 and 23,900,000 respectively.⁶ In 1960, the time lost due to work-stoppages was considerably less.⁷ Moreover, the public interest is also affected by means other than actual work-stoppages. Power may also be exercised in large sectors of the economy by means of more subtle forms of coercive bargaining.

At present, the United States possesses inadequate legal safeguards against those arbitrary and unilateral decisions which precipitate these industrial disputes. Prevailing concepts of collective bargaining merely require the parties to confer on certain subjects and to evince a desire to agree.⁸ The major legal restraint on the parties' bargaining power today is that an offer should not be so arbitrary or manifestly unfair as to evince a desire not to reach an agreement.⁹ Presumably this results in an attempt by a party with superior bargaining power to impose demands upon his weaker adversary without regard to standards of fairness and justice which are so vital in other areas of our law.¹⁰ At present, it appears that public opinion, rather than rules of law, is the chief restraint on the demands of the parties. The fear that certain aspects of these disputes will generate a public demand for regulatory legislation plays an undetermined role in the collective bargaining process. The implications from the fact that reliance on legal sanctions, rather than public opinion, in other areas of public interest leads to the conclusion that these safeguards are inadequate.

This article submits a proposal to rectify present inadequacies by the application of concepts of due process of law to labor-management disputes. This approach aims at equitable and peaceful industrial relations by means of Due Process of Economy. The premise of Due Process of Economy is that the public interest is paramount and may best be served by replacing what is primarily a rule of force with a rule of law. The plan

5. 1959 Statistical Supplement, MONTHLY LABOR REVIEW at 58.

6. *Ibid.*

7. Only two hours out of every 1000 available work-time hours were lost as a result of the inability of employers and unions to agree. New York Times, Jan. 6, 1961. In February of 1961, an insignificant wildcat walkout of a few Flight Engineers on Overseas Airlines in New York, ballooned into the most staggering and crippling United States Airlines strike in history. It was not a strike against employers but against a ruling by an agency of the United States government, and all because the Flight Engineers International Association feared that through that ruling they might lose their jobs in the cockpits to pilots. The seven striking airlines, American, Pan American, Trans-World, Eastern, Western and Flying Tigers, lost forty million dollars in business and the 84,000 non-striking employees, which had to be furloughed, lost millions more in wages. Families had to dip heavily into their reserve capital. Miami tourist business lost three million dollars a day and estimates reached as high as twenty-five million dollars for the 12-day strike.

8. Consult textual discussion accompanying footnote 46 *infra*.

9. *Ibid.*

10. Obviously, there are limitations on the club held by the party in the superior bargaining position. For instance, even the weakest employer is not likely to give in to such unreasonable demands that his prices would be clearly unable to meet those of competition. However, within limits, there appears to be room for extensive pressure by the stronger party.

requires the creation of a United States Economy Court in each existing federal circuit.

SCOPE OF PROPOSAL FOR DUE PROCESS OF ECONOMY

In Part I of this paper, by way of introduction, the concept of constitutional due process of law will be described as a background for this particular inquiry. In Part II, it is proposed first to review the history which led to the commitment to collective bargaining, and, also, to describe the present legal framework within which it operates. In Part III some inadequacies of the present statutory scheme will be pointed out. Finally, in Part IV, more details of the proposal for Due Process of Economy will be given. Its relation to, and effect upon, the existing framework in the United States will also be discussed.

PART I

DUE PROCESS OF LAW

Since the law cannot compel the spirit of brotherhood, can "due process" become the ligament of law between the constitution, the labor union and governmental action?¹¹ Due process of law has undergone an evolutionary process of expansion.^{11a} The term, "due process of law," comes to us from chapter three of Edward III (1355).¹² In the earlier years of its development, the phrase had only procedural significance.¹³ Today, in the United States, due process of law continues to insulate many procedural rights of the individual from the growing power of the state. But due process also has a profound impact on substantive law, both federal and state, as well.¹⁴

The perpetual process of development indicates the futility of attempting to find a concrete definition for the concept. Perhaps the touchstone is that the meaning of due process must be determined only by a "gradual process of inclusion or exclusion."¹⁵ Justice Cardozo suggested that this process "has not been arbitrary or casual. It has been dictated by a study and appreciation of the meaning, the essential implications, of liberty itself."¹⁶

11. Wellington, *The Constitution, The Labor Union and Governmental Action*, 70 YALE L.J. 345, 375 (1961).

11a. See generally Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957). See also Comment, 6 U.C.L.A. L. REV. 603 (1959).

12. "No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, or put to death, without he be brought to answer by due process of law." 28 Edw. 3, c. 3 (1355).

13. For a historical description of the phrase "due process" see LEGISLATIVE SERVICE, LIBRARY OF CONGRESS, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 971-80 (Corwin ed. 1952).

14. Cases dealing with racial discrimination and interstate commerce are illustrative of substantive due process.

15. *Davidson v. New Orleans*, 96 U.S. 97, 104 (1877).

16. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

A partial explanation of the ephemeral nature of due process lies in the fact that the majorities of the Supreme Court have adhered to the "flexible" or "natural law" theory of due process.¹⁷ The growth of this principle has been attributed, in part, to the Supreme Court's appeal to a "higher law." The subject of such an appeal is embodied in an inarticulated set of lofty principles, not made by the mind of man. The constitutional requirement of due process of law has become the instrument for the application of this philosophy regarding the power of the state both to regulate and to experiment with procedural innovations.¹⁸

In *Hurtado v. California*, flexible due process was identified with "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions."¹⁹ Justice Frankfurter, the chief adherent of a natural law theory of due process in the present Supreme Court, stated, "Due process is compounded of history, reason, the past course of decisions, and the stout confidence in the strength of the democratic faith which we possess."²⁰

These broad statements reflect the backdrop against which a particular fact situation is examined. For "what is due process of law depends on the circumstances. It varies with the subject matter and the necessities of the situation."²¹ In the last analysis, it is the particular factual matrix of fair play which determines whether a given process will be due process. Thus, due process appears to be the analytical tool used by the courts to bring principles of fairness to bear on a particular situation.

PART II

THE STRUGGLE FOR UNION RECOGNITION²²

The exploitation of the laboring classes has written an unenviable chapter in the history of the English-speaking people. The result of these unfortunate conditions was the genesis of labor unions. Samuel Gompers viewed labor unions as "organizations of necessity. They were born of the

17. See MOTT, *DUE PROCESS OF LAW* (1926). The competing theory is that of "fixed" due process. Proponents of this theory believe that the meaning of due process must be derived from historical intent as is manifest in objectively verifiable data. Justice Black is the present proponent of this view. In *Adamson v. California*, 332 U.S. 46, 75 (1947), Justice Black, in dissent, stated that "[T]he 'natural law' formula . . . should be abandoned as an incongruous excrescence on our Constitution." Justice Black reasoned, in part, that the natural law formula, "has been used in the past, and can be used in the future, to license this Court, in considering regulatory legislation to roam at large in the broad expanses of policy and morals and to trespass, all too freely, on the legislative domain of the States as well as the Federal Government." *Adamson v. California*, *supra* at 90.

18. See Kadish, *supra* note 11.

19. 110 U.S. 516, 535 (1884).

20. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 162-63 (1951) (concurring opinion).

21. LEGISLATIVE SERVICE, LIBRARY OF CONGRESS, *THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 1070 (Corwin ed. 1952).

22. For an excellent survey of the labor problem, see Note, 35 NOTRE DAME LAW 654 (1960).

necessity of workers to protect and defend themselves from encroachment, injustice and wrong."²³ Of course, the rise of organized labor met the expected resistance of the non-working classes.

The conspiracy doctrine and the labor injunction were the primary devices used to restrict the influence of unions. The classic criminal conspiracy case is the *Philadelphia Cordwainers' Case*²⁴ decided in 1806, wherein recorder Levy said, "A combination of workmen to raise their wages may be considered from a twofold point of view; one is to benefit themselves, the other is to injure those who do not join their society. The rule of law condemns them both."²⁵ This doctrine was widely applied²⁶ until its repudiation in *Commonwealth v. Hunt*.²⁷

Criminal prosecutions for conspiracy became infrequent solely because the injunction emerged as the usual form of action in labor disputes. While the precise date of the first labor injunction remains unknown, *Sherry v. Perkins*²⁸ and *United States v. Debs*²⁹ are usually cited as being the first. The use of the injunction in labor disputes was sustained primarily on the ground that it prevented irreparable damage to property.³⁰ Courts of equity used a similar reason as a justification for granting injunctive relief. An extension of the definition of property to include the right to do business was necessitated by the use of the injunction in labor law.³¹ By 1931, the labor injunction had been issued 1972 times.³²

The Sherman Act,³³ passed in 1890, declared combinations in restraint of trade to be illegal. By 1893, a district court held that Congress "made the interdiction include combinations of labor, as well as of capital."³⁴ In 1908, the Supreme Court sanctioned a similar construction of this act.³⁵

The Clayton Act³⁶ was hailed as the Magna Carta of labor. Section 20, in part, provided that no injunction should issue in a labor dispute unless it was necessary to prevent irreparable injury to property. This exemption of labor unions from anti-monopoly laws had little immediate impact on the growth of unions. In only three of thirteen reported cases between 1916 and 1920 was the use of the injunction denied.³⁷ The other ten cases

23. COMPERS, *LABOR AND THE COMMON WELFARE* 6 (1919).

24. 3 COMMONS & GILMORE, *DOCUMENTARY HISTORY OF AMERICAN INDUSTRIAL SOCIETY* 59, 233 (1910).

25. *Id.* at 67.

26. GREGORY & KATZ, *LABOR LAW: CASES, MATERIALS & COMMENTS* 19 (1948).

27. 45 Mass. (4 Met.) 111 (1842).

28. 147 Mass. 212, 17 N.E. 307 (1888).

29. 64 Fed. 724 (C.C.N.D. Ill. 1894), *aff'd sub nom. In re Debs*, 158 U.S. 564 (1895).

30. See generally FRANKFURTER & GREENE, *THE LABOR INJUNCTION* (1930).

31. Witte, *Early American Labor Cases*, 35 YALE L.J. 834 (1926).

32. WITTE, *THE GOVERNMENT IN LABOR DISPUTES* 84 (1932).

33. 26 Stat. 209 (1890), 15 U.S.C. §§ 1-7 (1958).

34. *United States v. Workmen's Amalgamated Council*, 54 Fed. 994, 996 (E.D. La.), *aff'd*, 57 Fed. 85 (5th Cir. 1893).

35. *Loewe v. Lawlor*, 208 U.S. 274 (1908).

36. 38 Stat. 730 (1914), 15 U.S.C. §§ 12-27 (1958), 29 U.S.C. §§ 52, 53 (1958).

37. FRANKFURTER & GREENE, *supra* note 30, at 165.

gave limited definition to the term "labor dispute," while broadly interpreting "irreparable injury" to property. The tenor of these cases was approved by the United States Supreme Court in *Duplex Printing Press Co. v. Deering*.³⁸ An injunction was sought to restrain a machinists' union and affiliated unions from maintaining a secondary boycott against the plaintiff's distributors and retailers. The district court³⁹ dismissed the bill and the court of appeals affirmed.⁴⁰ However, the Supreme Court reversed on the ground of an irreparable injury to an employer's business. The Supreme Court also held that section 20 applied only to employees and not to the machinists who were not affiliated with the plaintiff. Many states passed similar statutes which were construed in like manner.⁴¹

In 1926, labor received sorely needed aid from the federal government in the form of the Railway Labor Act.⁴² Prepared by both management and labor, this legislation was based on the theory that peaceful industrial relations could be attained through voluntary arbitration and mediation of disputes. Collective bargaining was embodied in a clause which stated: "It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions. . . ."⁴³

The Norris-La Guardia Anti-Injunction Act⁴⁴ can properly be regarded as a response to the narrow construction of previous statutes. This act, unlike the Clayton Act, broadly defined labor disputes and set out specific union activity which could not be thwarted by the use of a labor injunction. The effect of this act was to curb successfully the use of the injunction by federal courts in labor disputes.⁴⁵

*The New Deal and Labor Union Power*⁴⁶

Collective bargaining was extended to all industries in the National Industrial Recovery Act of 1933.⁴⁷ Section 7(a) provided that:

[E]mployees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or coercion of employers or labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.⁴⁸

38. 254 U.S. 443 (1921).

39. *Duplex Printing Press Co. v. Deering*, 247 Fed. 192 (S.D.N.Y. 1917).

40. 252 Fed. 722 (2d Cir. 1918).

41. FRANKFURTER & GREENE, *supra* note 30, at 181.

42. 44 Stat. 597 (1926), 45 U.S.C. §§ 151-163, 181-88 (1958).

43. 44 Stat. 577, 45 U.S.C. § 152 (1958).

44. 47 Stat. 70 (1932).

45. See *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938).

46. See generally Stern, *The Commerce Clause & the National Economy*, 1933-1946,

59 HARV. L. REV. 645 (1946).

47. 48 Stat. 195 (1935).

48. 48 Stat. 198 (1935).

Although the NIRA was declared unconstitutional,⁴⁹ it existed long enough to act as a stimulus to trade union activity.⁵⁰

The National Labor Relations Act (Wagner Act)⁵¹ replaced the NIRA. The premise of the Wagner Act was the belief "that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the act in itself does not attempt to compel."⁵²

Section 7 of the Wagner Act carried over the provisions of section 7(a) of the NIRA. This section insured the rights of employees to organize and bargain collectively through freely chosen representatives, and to engage in concerted activity. This section can properly be regarded as the heart of the statute. In an effort to protect the rights of employees granted in section 7, certain prohibited acts were enumerated in section 8.

Section 8(a)(5) provides that it shall be an unfair labor practice "for an employer to refuse to bargain collectively with the representatives of his employees"⁵³ In light of the purposes of the act, Congress did not seem to appreciate the difficulties involved in the application of such a provision. Senator Wagner's attitude is indicative. He stated that section 8(a)(5) "does not compel anyone to make a compact of any kind if no terms are arrived at that are satisfactory to him. The very essence of collective bargaining is that either party shall be free to withdraw if its conditions are not met."⁵⁴

The Chairman of the Senate Committee on Education and Labor said: When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it.⁵⁵

It soon became evident that industrial peace would not be effectuated if the law merely required the parties to confer. Some legal standards had to be imposed upon the quality and content of the negotiations, because, in too many cases, management met with labor only to "talk it to death." In order to prohibit sham negotiations, section 8(a)(5) has been interpreted to require a sincere desire to reach an agreement. In *Wilson & Co. v. NLRB*, the court said:

49. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 459 (1935).

50. William Green, President of the American Federation of Labor, announced on October 1, 1933, that his union's membership had increased 1,300,000 since the passage of the NIRA. *N. Y. Times*, Oct. 2, 1933, p. 1.

51. National Labor Relations Act (Wagner Act), 49 Stat. 452 (1935), 29 U.S.C. § 157 (1958).

52. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

53. National Labor Relations Act (Wagner Act), 49 Stat. 453 (1935), 29 U.S.C. § 158(a)(5) (1958).

54. 79 CONG. REC. 7571 (1935).

55. 79 CONG. REC. 7660 (1935).

While the act does not compel that employer and employees shall agree, it contemplates that agreements will be reached as the result of collective bargaining. It obligates the employer to bargain in *good faith* both collectively and exclusively with the chosen representatives of a majority of his employees. . . .⁵⁶ (Emphasis added.)

There are, of course, certain difficulties inherent in applying the subjective standard of good faith. The National Labor Relations Board and the reviewing courts have the problem of determining the mental status of the parties under such a test. Usually such a determination must be based upon inferences drawn from a host of often contradictory activities by members of the parties concerned. However, certain acts have been held evidence of bad faith: an employer's refusal to recognize a union supported by a majority of his employees;⁵⁷ setting conditions for the commencement of negotiations;⁵⁸ a refusal to make counter-offers;⁵⁹ sending negotiators who do not have the authority to complete negotiations;⁶⁰ repeatedly shifting position during negotiations;⁶¹ and organizing campaigns directed against the union.⁶²

Presumably, the difficulties involved in applying this subjective standard of good faith have led the NLRB to isolate specific actions and label them violations, per se, of the duty to bargain in good faith. The most common violations per se are a refusal to put an agreement in writing⁶³ and the unilateral granting of wage increases or other concessions during negotiations.⁶⁴

Statistics reflect the full impact of the Wagner Act. From 1935-1947, union membership increased from 4 million to approximately 15 million.⁶⁵ Coupled with this rise in union strength was a growing belief by some that the Wagner Act was one-sided in that it did not list any unfair labor practices on the part of labor. It was only a matter of time before such a belief was reflected in amendments to the Wagner Act.

As the passage of the amendments would suggest, the Wagner Act failed to produce industrial harmony by a reduction of labor disputes. During World War II, there were over 13,000 strikes.⁶⁶ Moreover, in 1946, the first year of international military peace, the United States was

56. 115 F.2d 759, 763 (8th Cir. 1940). See generally Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065 (1941).

57. NLRB v. Lettie Lee, Inc., 140 F.2d 243 (9th Cir. 1944).

58. NLRB v. Hoppes Mfg. Co., 170 F.2d 962 (6th Cir. 1948).

59. NLRB v. Montgomery Ward & Co., 133 F.2d 676 (9th Cir. 1943).

60. Great So. Trucking Co. v. NLRB, 127 F.2d 180 (4th Cir. 1942).

61. Franklin Hosiery Mills, Inc., 83 N.L.R.B. 276 (1949).

62. NLRB v. Century Oxford Mfg. Corp., 140 F.2d 541 (2d Cir. 1944).

63. NLRB v. Highland Park Mfg. Co., 110 F.2d 632 (4th Cir. 1940).

64. Aluminum Ore Co. v. NLRB, 131 F.2d 485 (7th Cir. 1942).

65. McNAUGHTON & LAZAR, *INDUSTRIAL RELATIONS AND THE GOVERNMENT* 154 (1954).

66. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 263, 273 (1958).

besieged by industrial strife. In that year alone, there were approximately 5000 strikes which cost the country 116 million lost man-hours.⁶⁷ In 1947, work-stoppages cost the American public an additional 34 million man-hours.⁶⁸

Taft-Hartley Amendments to the Wagner Act

The amendments to the Wagner Act took the form of the Labor-Management Relations Act (Taft-Hartley).⁶⁹ Although many factors induced the legislation, there appears to be no doubt that "the authors of the Taft-Hartley Act proceeded on the premise that labor unions had become too powerful and that it was therefore necessary to bring about a new balance of power in the collective-bargaining process."⁷⁰

While Congress apparently sought to restrict the power of labor by passing the Taft-Hartley Act, it certainly did not abandon the national commitment to collective bargaining as the appropriate means for settling industrial disputes. Essentially, the process was to remain a voluntary give and take. However, now there was to be more governmental assistance.

Section 7 was extended to guarantee employees the right to refrain from union activities. Perhaps this change was motivated by beliefs such as Senator Taft's statement to the effect "that if bargaining power could be equalized, many of the industrial-relations problems . . . would tend to disappear through the action of collective bargaining."⁷¹ These 1947 amendments regulate subject matter⁷² and procedure.⁷³ They also limit the economic weapons which a union may use in achieving its desires.⁷⁴ The act provided for unfair labor practices on the part of labor which correspond to those originally imposed on management. Section 8(b)(3) established that it shall be an unfair labor practice for a union "to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of Section 9(a). . . ."⁷⁵

After an exhaustive study of the Taft-Hartley Act, Professor Cox concluded:

Despite its great importance, the Wagner Act dealt with only a narrow segment of industrial relations. The Act prevented employers from interfering in the organizational activities of employees and

67. *Ibid.*

68. *Ibid.*

69. 61 Stat. 136 (1947), 29 U.S.C. § 101 (1958) [hereinafter referred to as LMRA].

70. McNAUGHTON & LAZAR, *op. cit. supra* note 65, at 154.

71. *Id.* at 159.

72. LMRA §§ 7, 8(a)(3) prohibit the negotiating of a closed shop provision. For a competent treatment of government regulations of the subject matter of collective bargaining, see Cox & Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950).

73. LMRA § 8(d)(1) requires that a union must give 60 days notice of its intent to terminate the contract.

74. LMRA § 8(b)(4) attempted to make secondary boycotts illegal.

75. LMRA § 8(b)(3).

labor unions. It required them to recognize and bargain with a union designated as representative by a majority of the employees in an appropriate unit. Beyond this the Wagner Act left collective bargaining to develop freely without government intervention. The Taft-Hartley Act restricts the conduct of employers, employees, and Labor unions, both before and after the establishment of collective bargaining relationships. Thus, it is a major step into a new field of federal regulation.⁷⁶

The regulatory increase, implicit in the Taft-Hartley Act was paralleled, if not exceeded, by the NLRB's construction of section 8(a) (5) and labor's counterpart, section 8(b) (3). It soon became apparent that, although professing to use the rubric of good faith, the Board did not always consider a sincere desire to reach an agreement sufficient to comply with the statutory duty to bargain. In the *Truitt Mfg. Co.* case, the NLRB stated that "it is settled law, that when an employer seeks to justify the refusal of a wage increase upon an economic basis . . . good-faith bargaining under the Act requires that upon request the employer attempt to substantiate its economic position by reasonable proof."⁷⁷ An American Bar Association report states that the *Truitt* case "appears to reflect an attempt to proscribe bargaining practices deemed incompatible with *reasoned* discussion."⁷⁸ (Emphasis added.) Moreover, the NLRB has ruled that a slowdown sponsored by the union during negotiations is irreconcilable with the statutory duty to bargain in good faith.⁷⁹ The Board's regulation of bargaining tactics of unions was extended in subsequent cases.⁸⁰ Solicitor-General Cox, then Professor Cox, was quick to point out that these actions by both employers and employees were entirely consistent with a desire to reach agreement.⁸¹ In this line of cases, then, the NLRB appears to demonstrate two things: first, that the NLRB feels that the present statutory safeguards embodied in the good faith rule are inadequate to protect the public interest; second, the NLRB, under the guise of following the statutory formula, is legislating in an attempt to overcome its present inadequacies.

In recognition of these factors, the Supreme Court apparently has extended this line of cases. In the *Insurance Agents' Int'l Union*⁸² case, the Board relied on *Personal Products*,^{82a} in holding that a union's use of

76. Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 274, 312-13 (1948).

77. *Truitt Mfg. Co.*, 110 N.L.R.B. 856 (1954), *aff'd*, 351 U.S. 149 (1956), *reversing* 224 F.2d 869 (4th Cir. 1955). See generally Feinsinger, *The National Labor Relations Act and Collective Bargaining*, 57 MICH. L. REV. 807 (1959).

78. *Section of Labor Relations Law, Report of the Committee on Development of the Law Under the National Labor Relations Act*, 84 A.B.A. REP. 68 (1959).

79. *Textile Workers Union of America*, 108 N.L.R.B. 743 (1954), *rev'd*, 227 F.2d 409 (D.C. Cir. 1955), *cert. denied*, 352 U.S. 864 (1956).

80. *International Union, UMW*, 117 N.L.R.B. 1095 (1957); *International Union, UMW*, 117 N.L.R.B. 1072 (1957).

81. See Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

82. 119 N.L.R.B. 768 (1957).

82a. *Textile Union Workers of America*, *supra* note 79.

harassing tactics during negotiations is fundamentally inconsistent with the statutory bargaining requirement even if the union did sincerely wish to reach an agreement. In affirming the court of appeals,⁸³ the Supreme Court stated that the Board's view was incorrect because "there is simply no inconsistency between the application of economic pressure and good-faith collective bargaining."⁸⁴ The Court was of the view that the Board cannot "in the guise of determining good or bad faith in negotiations . . ."⁸⁵ regulate the parties' choices of economic weapons; for to do so might be giving the Board leverage to alter the relative power of the adversaries and thus affect the substantive terms of the agreement. However, the Court was not unsympathetic with the Board's attempt to regulate the economic weapons and thus foster "reasoned discussion." As it stated:

It is suggested here that the time has come for a reevaluation of the basic content of collective bargaining as contemplated by the federal legislation. But that is for Congress. Congress has demonstrated its capacity to adjust the Nation's labor legislation to what, in its legislative judgment, constitutes the statutory pattern appropriate to the developing state of labor relations in the country. Major revisions of the basic statute were enacted in 1947 and 1959. To be sure, then, Congress might be of the opinion that greater stress should be put on the role of 'pure' negotiation in settling labor disputes, to the extent of eliminating more and more economic weapons from the parties' grasp, and perhaps it might start with the ones involved here; or on consideration of the alternatives, it might shrink from such an undertaking. But Congress' policy has not yet moved to this point, and with only section 8(b)(3) to lean on, we do not see how the Board can do so on its own.⁸⁶

Ancillary Devices Supplementing Collective Bargaining

Leaving the parties relatively free to arrive at their own solution does not always achieve a result consonant with the best interests of the public. Consequently, several ancillary devices have been born. These processes aim either at assisting the parties to arrive at agreement or to step in when negotiations have broken down.⁸⁷ Unfortunately, however, these devices have also proved inadequate.

Mediation or conciliation is one form of assistance given to the disputing parties. It is effectuated by the addition of an impartial third party. Since the mediator is voteless, however, his sole tool is persuasion.⁸⁸

83. *NLRB v. Insurance Agents' Int'l Union*, 260 F.2d 736 (D.C. Cir. 1958).

84. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 494-95 (1960). For an excellent discussion of recent Supreme Court labor law decisions, see Hays, *The Supreme Court and Labor Law, October Term, 1959*, 60 COLUM. L. REV. 901 (1960).

85. *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 490 (1960).

86. *Id.* at 500.

87. For a discussion of emergency provisions of Taft-Hartley, see note 3 *supra* and related text.

88. See Mills, *The Role of Mediation in Collective Bargaining*, 23 TENN. L. REV. 146 (1954).

In this capacity, the mediator attempts to persuade the parties to employ reason rather than force in resolving their differences. One commentator has noted the severe limitations of mediation by stating, "It can serve well only if the parties are disposed to let it do so."⁸⁹ The difficulty would seem to be that if one party had a superior bargaining position, he may think that mediation would rob him of his advantage. Consequently, such a party may have no desire to replace "force with reason."

The Taft-Hartley Act indirectly encourages arbitration as another device in settling disputes.⁹⁰ Arbitration entails the addition of a third party who sits as a judge. The vast majority of collective bargaining contracts make arbitration the terminal step in grievance procedure.⁹¹ Arbitration has proved a valuable device as far as it goes. However, those issues which vitally affect the public interest are rarely submitted to arbitration. For example, only about two percent of the requests for arbitration panels received by the Federal Mediation and Conciliation Service involved the terms of future contracts.⁹²

In past years, the federal government has resorted to plant seizure when collective bargaining has failed.⁹³ However, today, the power of the President to use this device as a means of intervention appears dubious since the decision of *Youngstown Sheet & Tube Co. v. Sawyer*.⁹⁴ As the Court stated:

The power of Congress to adopt such public policies . . . is beyond question. It can authorize the taking of private property for public use. It can make laws regulating the relationships between employers and employees, prescribing rules designed to settle labor disputes, and fixing wages and working conditions in certain fields of our economy. The constitution does not subject this law-making power of Congress to presidential . . . supervision or control.⁹⁵

Related to plant seizure is the process of an employee draft. Under this plan, the workers of a striking plant would become employees of the government and, thus, unable to strike. One drawback of this plan would be the fact that it would not take effect until after the public interest had been injured by a work stoppage. One additional difficulty

89. Cole, *Government in the Bargaining Process: The Role of Mediation*, 333 *Annals* 42, 58 (1961).

90. LMRA § 203(c) encourages arbitration by providing that if FMCS fails to settle the dispute it should induce the parties to seek other means for settling the dispute. Section 301(a) produces similar results by permitting damage suits for breach of labor-management agreements. See generally Bennett, *The General Legal Status of Labor Arbitration*, 1 *So. Tex. L.J.* 26 (1954).

91. See Davey, *Labor Arbitration; A Current Appraisal*, 9 *IND. & LAB. REL. REV.* 85 (1955).

92. *Id.* at 89.

93. See generally *Federal Seizure in Labor Management Disputes, 1917-1952*, 76 *MONTHLY LABOR REV.* 611 (1953).

94. 343 U.S. 579 (1952).

95. *Id.* at 588.

with establishing this plan is the fact that Congress once refused President Truman's request for this power.⁹⁶

PART III

PRESENT INADEQUACIES SUGGEST CREATIVE DUE PROCESS OF ECONOMY

Historically, the field of industrial relations has now completed the circle. Contrary to the time when the concern was over the huge power of big business, today, a substantial portion of the literature in the field argues that labor unions have become too powerful for the general good.⁹⁷ Much of labor's power can be attributed to statutory immunities⁹⁸ granted over the years and to favorable administrative and judicial construction.⁹⁹ Dean Roscoe Pound has stated that the administrative agencies have:

along with the legitimate function of assuring equality in collective bargaining between employer and employee and securing the rights of employees in that relation, have also acquired a function of upholding immunities of labor organizations and their leaders at the expense of the public. They do not protect the public. In such matters as procedure in violation of the antitrust laws, restraint of trade and interference with commerce, security of private property, and the right to work, they protect labor organizations and labor leaders *against* the public.¹⁰⁰

Relevant statistics reveal the phenomenal growth of labor unions. In 1900, less than one million workers in a national labor force of twenty-nine million were union members.¹⁰¹ By 1958, approximately 18.1 million workers were union members.¹⁰² Moreover, union wealth in the form of union welfare and pension plans has been estimated at nearly 34 billion dollars.¹⁰³

As discussed *supra*,¹⁰⁴ the legislative history and specific amendments of the Taft-Hartley Act make it clear that the premise of the act is a

96. President Truman, in connection with the railroad strike of 1946, asked Congress for legislation which would enable him to induct striking employees into the army, 92 CONG. REC. 5753 (1949). Also see Gebhart, 30 J. AM. JUD. SOC'Y 16 (1945) for a plan which combines government seizure and draft.

97. See, e.g., Pound, *Legal Immunities of Labor Unions*, in CHAMBERLIN, *LABOR UNIONS AND PUBLIC POLICY* 122 (1958).

98. See textual discussion accompanying footnote 22 *supra*.

99. In *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), restraints of trade by organized violence were held to be exempt from federal prosecution. The Supreme Court declared that the Clayton Act immunized that violation from the Sherman Act. In *United States v. Hutcheson*, 312 U.S. 219 (1941), the Norris-La Guardia Act was said to have expanded the Clayton Act immunity. See also *Allen-Bradley Co. v. Local Union 3*, 325 U.S. 797 (1945). This line of cases, in effect, has construed the Norris-La Guardia and Clayton Acts as a *pro tanto* repeal of the Sherman Act.

100. Pound, *supra* note 97, at 171.

101. Clague, *The American Worker and American Industry*, 71 MONTHLY LABOR REV. 11 (1950).

102. Cohany, *Union Membership 1958*, 83 MONTHLY LABOR REV. 4 (1960).

103. Levitan, *Welfare and Pension Plans Disclosure Act*, 9 LAB. L.J. 827, 828 (1958).

104. See textual discussion accompanying footnote 69 *supra*.

general conviction that the growing power of the unions should be curtailed. This regulation of labor organizations was extended after the disclosures of the McClellan Committee.¹⁰⁵ These highly publicized investigations of corruption and coercion in unions were the motivating forces behind the Labor Management Reporting and Disclosure Act (LMRDA) of 1959.¹⁰⁶

The Landrum-Griffin Act, Title VII, deals with amendments to the Taft-Hartley Act. It deals with the problems of federal-state jurisdiction,¹⁰⁷ picketing, secondary boycotts, "hot cargo" agreements, and the status of economic strikes in representative elections. Secretary of Labor Goldberg, in conjunction with Kenneth Meiklejohn, concluded that Title VII of LMRDA is:

unfair and weighted against labor in important respects. This is largely the result of the questionable procedures developed in an atmosphere of intense emotion and propaganda which were followed in securing the inclusion of anti-labor, rather than anti-corruption, provisions in the act.¹⁰⁸

The other segment of the act marks a new era in the legal regulation of the internal affairs of unions. The purpose, essentially, is to insure union democracy. Congress explicitly protected union members in the free exercise of those political rights necessary for self-government.¹⁰⁹ Freedom of speech and assembly and equal rights are now "guaranteed" to union members. The same is true of the right of access to the civil courts, to sue and to testify. Also provided are limitations on the execution of fees, assessments, the collection of dues, and safeguards against improper disciplinary action.

Few non-partisans would dissent from the view that legal restraints were needed to curb the abuses of some powerful labor organizations. Unfortunately, there is evidence that these recent legislative enactments have failed to accommodate the complicated nature of our labor structure. The nation needed a discriminating amendment which would eliminate

105. For an inside view of the proceedings of the McClellan Committee, see KENNEDY, *THE ENEMY WITHIN* (1960). See also PETRO, *POWER UNLIMITED: THE CORRUPTION OF UNION LEADERSHIP* (1959).

106. 73 Stat. 519, 29 U.S.C. §§ 153, 158-60, 187, 401-531 (Supp. 1959); see generally Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 1086 (1960); Cox, *Landrum-Griffin Amendments to the National Labor Relations Acts*, 44 MINN. L. REV. 257 (1959); *Labor Management Reporting and Disclosure Act, 1959: A Symposium*, 54 NW. U.L. REV. 659 (1960).

107. The question of federal pre-emption has provoked widespread controversy. While it is beyond the scope of this paper to analyze this aspect of labor law, it should be noted that this problem underlies the proposal for Due Process of Economy. For competent discussions, see Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations*, 59 COLUM. L. REV. 6, 269 (1959); Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954).

108. Goldberg & Meiklejohn, *Title VII: Taft-Hartley Amendments with Emphasis on the Legislative History*, 54 NW. U.L. REV. 747, 781 (1960).

109. See Summers, *The Law of Union Discipline: What the Courts Do In Fact*, 69 YALE L.J. 175 (1960), for a line of New York cases dealing with internal union disputes.

the abuses of some large, powerful unions and, at the same time, aid newly organized and unorganized workers. Instead, Congress passed unselective acts which impose obligations on all concerted activity. Solicitor-General Cox has stated:

The change of policy [behind the Taft-Hartley Act] appears to be based on the belief that labor unions have become so strong that legislative action was required to redress the balance of power in the collective bargaining process. But it is not the unions with crushing economic power that will feel this change; it is the unorganized employees and the weak, newly-organized locals.¹¹⁰

The Landrum-Griffin Act may be criticized for the same reasons Solicitor-General Cox has criticized the Taft-Hartley Act. Although the ethical practices of small unions have not been questioned, the Landrum-Griffin Act may affect these organizations more than those big unions whose practices have been investigated. The cause of such an effect would be the fact that the larger unions can retain lawyers to manage their affairs.¹¹¹ Furthermore, at least one writer has noted that Title VII provisions would not only adversely affect small unions but small employers as well.¹¹²

Another inconsistency of the present statutory scheme is that government employees, who are not permitted to strike, have no alternate machinery for presenting their demands to their employer, the government. Professor Gregory highlights this inadequacy when he writes:

Surely we all agree that government employees cannot be allowed to strike. Congress recognizes this in the Taft-Hartley Act simply by flat prohibition and the punishment of individual strikers. But Congress surely ought to practice some of what it preaches and imposes on others, at least by substituting a procedure where organized government employees could present demands and have them arbitrated.¹¹³

Empirical data seems to indicate the need for a new legislative scheme which would afford more adequate protection for the unorganized and weak unions. This data reveals that the proportion of the national income earned by the working class has remained substantially constant during the rising years of the labor unions.¹¹⁴ During the same period, impressive gains have been made by some of the stronger unions with better bargaining positions. These facts lead to the conclusion that such gains have been made at the expense of workers who are unorganized or who belong to weaker unions.

110. Cox, *supra* note 76, at 44-45.

111. See Taft, *The Impact of Landrum-Griffin on Union Government*, 333 *Annals* 130 (1961).

112. See Shils, *Impact of Landrum-Griffin on the Small Employer*, 333 *Annals* 141 (1961).

113. Gregory, *Introduction to Symposium*, 35 *NOTRE DAME LAW.* 592, 593 (1960).

114. Kerr, *Labor's Share and the Labor Movement*, in TAYLOR & PIERSON, *NEW CONCEPTS IN WAGE DETERMINATION* 260, 280-81 (1957).

PART IV

JUDICIAL ECONOMY AND "THE NEW FRONTIER"

As outlined *supra*, the proposal of a new statutory scheme rests on the Due Processes of Economy, the application of the due process, or "fair plays" of the law to industrial disputes by the proposed United States Economy Court. The public interest is the paramount standard that would permeate all determinations of labor-management proceedings before this court. The primary consideration always would be given to the sound values of the liberties of self-determination in disputes or relations between management and labor. It is apparent that public interest is inseparable from the public aspects of a national emergency, and at all times the court would be aware of the strong political pressures which are present in a desirable or undesirable settlement. At no time would this court negate the importance of the union weapon of a strike. But free collective bargaining within the framework of judicial economic standards would achieve basic formulations for reducing the pressures on both labor and management. Similarly, pressures would be minimized on the government which is essentially involved as one of the necessary parties disputant.

The court would be comprised of three judges, sitting *en banc*. Each would be trained in economics and assisted by economists who would be full-time appointees. The court would also have the power to appoint amicus curiae and the public interest would be represented by a special assistant attorney-general from the Department of Labor to present its viewpoint. Under this system, a charge of an unfair labor practice during the term of a contract would not justify the use of the intimidating aspects of economic or extra-legal pressures. The same would be true of any dispute arising from the interpretation or modification of a labor-management agreement.

In these situations, either side could initiate a complaint in the United States Economy Court not less than ninety days prior to the expiration date of any agreement or, in the event of an original situation, would be required to file a complaint charging the absence of good faith in collective bargaining.

In a free enterprise system, the dominant value of the individual freedom not to work, exercised in concert with others, is a basic liberty that should not be curtailed lightly.^{114a} The court would respect the sophisticated fact that the regulation of labor organizations by the Congress, in order to accomplish the objective of a free flow of commerce, is distinctive from the other voluntary unincorporated associations of a social, fraternal, or religious nature. While it is the American public

^{114a}. Horlacher, *A Political Science View of National Emergency Disputes*, 333 Annals 86 (1961).

policy not to impair the liberties in collective bargaining and in labor-management agreements, a public "bill of rights" should prevail in the judicial determination of any dispute. A dispute between the parties may well result in damages being awarded with a view to compensating the injured party and deterring similar conduct in the future.

The significance of advocating a court rather than an administrative board is that the immediacy of the enforcement of a court order could be implemented by summary contempt proceedings and also by the sanctions of imprisonment or fine. In addition, there would be the mandatory and restraining injunctive relief.

In the event the court found or ordered that a national emergency dispute was involved between the parties, the court would have summary powers to restrain either side to such time as the dispute or contract differences could be determined. In the past, the courts have shown little imagination in creating remedial orders which might preserve some of the values of the due process rule, and yet not leave management or labor unprotected. The power of the United States Economy Court would afford judicial protection against oppressive union disciplines or similar management conduct and would become meaningful only to the extent that effective remedies were practically available. There must not be any delay involved in obtaining judicial protection for either side. Furthermore, the costs of litigation would have to be minimized and the length of litigation should be resolved within short order.

Moreover, if no agreement had been reached six months after the termination of a collective bargaining contract, the parties would appear before the United States Economy Court for a judicial determination. During the six month period, and during the judicial proceedings, the use of economic pressures would be eliminated and the employees would continue to work under the terms of the old contract. Until the initiation of judicial proceedings, labor and management would be encouraged to settle their disputes. The existing devices, such as conciliation and arbitration, would remain at their disposal. Presumably, an inclination for settlement out of court would provide the parties with the incentive to give these ancillary devices a fair chance to operate.

As in any other judicial proceedings, the court would entertain oral and written arguments. Similarly, interested parties could present *amicus curiae* briefs. The court's decision would bind both parties, and traditional contempt of court proceedings would be available against any party who attempted to defy the court. Judicial appeal would, of course, be available. In addition, this proposal would specify that the statutory provisions and rules applicable to the existing federal courts would apply to the United States Economy Court. However, these new courts would be given discretionary power to modify inappropriate rules.

This plan would not inhibit the privileges of the individual because each worker would remain free to quit work. Hence, there would be no violation of the thirteenth amendment. However, provision should be made that anyone ceasing work would do so under the customary conditions of a permanent termination of employment. Any concerted withdrawal from work, amounting to work-stoppages, would be unlawful. On the assumption that such mass activity is rarely spontaneous, the court could impose penalties on those who were responsible for such action.

Even as due process is the analytical tool which courts employ in bringing fairness to bear on situations in other areas of the law, so the Due Process of Economy would operate in the field of labor relations. Thus, it would be well suited for deciding job security issues arising from automation. The New York Times reported that the recent New York harbor strike, "provided fresh evidence . . . that worries over job security, not wages, would be the chief labor-management hurdle on the road to the New Frontier."¹¹⁵ Historically, the collective bargaining process was not designed to meet problems crucially affecting the public interest. Consequently, it appears that the solutions to the problems raised by these issues should be formulated in the dry light of the judicial process rather than in the arena of economic muscle.

Some critics could claim that a drawback of this proposal would be setting a standard for the determination of wage issues. However, such a task should actually be simpler than that confronting an administrative agency in ascertaining consumer rates and a fair return on capital to investors in public utilities. Admittedly, this is a difficult task. However, such a task had to be undertaken in this area to protect the public just as it must be protected in the field of labor-management relations. Moreover, the setting of standards for public utilities appears more difficult than settling wage disputes; for in the former situation, the administrative agency is presented with unilateral demands. In the latter case, wage determinations would be made in the context of a wage dispute which included boundaries set by the proposals of both parties. Labor and management would not be unlike adversaries in a tort case where the issue might be the value of an arm or a leg. Both would present their arguments on the matter, and the court would, in effect, be limited by their alternatives. In either event, the court would be compelled to weigh the merits and arrive at a conclusion based on fairness.

The effects of the Due Process of Economy would be manifold. It would assure the United States industrial stability since all forms of coercive economic pressures would be prohibited. Instead, labor-management disputes would be settled by the parties themselves with the assistance of third parties as they may decide. And in the event of a prolonged

115. N.Y. Times, Jan. 29, 1961, § E, p. 12.

stalemate, the United States Economy Court would make a judicial determination in the best interests of the United States public. Furthermore, it would promote fair dealings between the parties. The use of coercive power, however subtle or direct, by both unions and management would be curtailed. When weak unions, unorganized workers or small employers are confronted by powerful adversaries, they would not need to succumb to economic muscle power. Instead, they would have the protection of the courts. Moreover, the effects of the *Due Process of Economy* would extend to groups, such as government employees, who do not benefit from the existing legislative scheme.

The relatively high degree of strike activity in the United States threatens the inspired hope of President John F. Kennedy's "New Frontier" for national strength, safety, international acceptance and social and industrial welfare. Governmental regulation of collective bargaining, the resort to eighty-day injunctive periods when strikes and lockouts seriously threaten the national health or safety, falls far short of the determinant rule of law established by a judicial-economic tribunal relying upon the evidentiary evaluation of economic factors relating to the needs, demands and projected requirements of labor and capital. By 1970, a 20 percent increase in the labor force has been forecast.¹¹⁶ By the year 2000, a population of 200,000,000 is conservatively estimated with a 60 percent labor force increase over the decade increase of 1960-1970. Special problems, economic and labor-personnel with increased union membership will make present coercive collective bargaining methods archaic and dangerously perilous.

The very survival of the United States and its free world allies may very likely depend upon a sustained economic social structure with rare and exceptional work stoppages pursuant to and permissible only by an order of the United States Economy Court. The power of one man or group of men to force a large disciplined body of men to take action against their will¹¹⁷ would be a denial of due process of economy and branded as obsolescent under this rule of law.

116. Estey, *The Impact of Labor Force Changes on Labor Relations*, 333 Annals 1 (1961). See also U.S. DEP'T OF LABOR, *MANPOWER — CHALLENGE OF THE 1960's* (1960).

117. Henly, *A Union Viewpoint*, 333 Annals 5, 10 (1961).